



Order Decision

Site visit made on 28 February 2017

by Susan Doran BA Hons MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 06 April 2017

Order Ref: FPS/E2001/7/30

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The East Riding of Yorkshire Council (Former Haltemprice Urban District Restricted Byway No.50) Definitive Map and Statement Modification Order 2016.
- The Order is dated 11 March 2016 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when the East Riding of Yorkshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed subject to a modification set out below in the Formal Decision

Procedural Matters

1. This case concerns the addition of a Restricted Byway at Springfield Lane, Anlaby, between point B on the plan attached to the Order, Springfield Lane, and point A, Springfield Way. The matter is being dealt with by way of written representations. In addition to the statutory objection made by Mr Kind, comments have been submitted by an interested party, Mr Thompson¹. I have taken into account all of the evidence and submissions before me in determining this Order.

The Main Issues

2. The criteria for confirmation of the Order are contained in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ("the 1981 Act"). This requires me to consider whether the evidence discovered shows on a balance of probabilities that a restricted byway subsists along the Order route and should be recorded in the Definitive Map and Statement ("DMS").
3. The Council relies on claimed use by the public and a presumption of dedication arising under Section 31 of the Highways Act 1980 ("the 1980 Act"). There is also documentary evidence available. In this case, however, the user and documentary evidence are not challenged. At issue are two main points. Firstly, the status of the Order route. Here the effect of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") and its provisions are relevant together with case law, *Whitworth v Secretary of State for Environment, Food and Rural Affairs* [2010] ("*Whitworth*"). Secondly, the width of the Order route and the limitation recorded in the Order schedule.

¹ Who made an objection which he subsequently withdrew

Reasons

Documentary evidence

4. A range of documents including Ordnance Survey maps, Finance Act 1910 records, Railway plans and the DMS were considered by the East Riding of Yorkshire Council ("the Council"). I agree with the Council that these demonstrate the Order route was created as a private road further to an agreement made in 1883, and has remained a private road since that time. However, from the 1950s there is evidence of use by the public. As none of the documents available are conclusive as regards the existence or status of any public rights enjoyed, it is necessary to consider the evidence of claimed use.

User evidence

5. The Council took the date of the application as the date when the public's right to use the Order route was brought into question for the purposes of Section 31 of the 1980 Act, giving a 20 year period of 1993 to 2013: there is no indication of any earlier date of bringing into question. During this 20 year period, evidence of use is claimed by 31 individuals on foot, by 3 on horseback and by 19 with a pedal cycle². Claimed use is frequent, as of right - without force, secrecy or permission - and without interruption throughout the 20 year period, and is consistent with the use of a public right of way for recreation, to access local amenities and so forth, such as to raise a presumption of dedication. There is no evidence of any actions by the landowner(s)³ to suggest a lack of intention to dedicate the Order route as a public right of way.
6. I am satisfied having reviewed the evidence that a public right of way subsists over the Order route further to the provisions of Section 31 of the 1980 Act. I consider below its status.

Width and limitation

7. The Order records a width of 8.5 metres for the Order route, with a limitation of a gate and bollards creating a 'pinch point' of 1.6 metres at point B. However, Mr Kind argues that the Council has not adequately demonstrated that the limitation was in place at the beginning of the qualifying period of user.
8. As regards width, I note the Order route has a uniform appearance, bounded on both sides for the most part, and has a surfaced 'carriageway' and pavement along one or other side for its length between points A and B. Users estimate a width of anywhere between 3 metres and as much as 29 metres⁴, although mostly in the region of 6-9 metres. Photographs in the submissions show users enjoying the full width available and this is consistent with the Council's findings. I therefore consider the width stated in the Order (8.5 metres) reflects both the way and the use made of it, and is appropriate.
9. As regards the limitation, I agree with Mr Kind that for it to be recorded it must have been present at the beginning of the relevant 20 year period under consideration, such that the Order route was dedicated to the public subject to

² Also by one individual with a vehicle, although this was not clarified further and accordingly attracts little weight

³ Most of the land over which the Order route passes is unregistered and the landowner(s) unknown

⁴ By one individual, although this is inconsistent with other evidence

the presence of that limitation. Several of the user evidence forms indicate the presence of a gate preventing vehicle access and alongside a gap for users. The documentary evidence indicates that there has been a gate present for many years. However, it has not always been in its current position. Over the years the extent of the private road has reduced resulting in the gate being repositioned further to the south (of its original location) in 1957 and again in 1970. In 2002, within the 20 year period, it was repositioned again, about 19m further south, to its present location (point B).

10. Whilst the Council points out that public rights have arisen subject to the presence of the gate and gap (together comprising a limitation to use), and the public has accepted the dedication subject to their presence, it is the case that, on their evidence, the present gate and gap have only existed at point B on the Order plan for the last 11 years of the relevant 20 year period considered above. Prior to this, the limitation was located to the north of point B, and thus to the north of the Order route. Accordingly, I conclude it is not appropriate to record the limitation in the Order since it was not present (at point B) at the beginning of the 20 year period. I shall therefore modify the Order by removing the references to it.

Status

Byway status

11. Section 67(1) of the 2006 Act provides that, unless preserved by an exception set out in that Act, an existing public right of way for mechanically propelled vehicles ("MPVs") is extinguished if it is over a way which, immediately before commencement of the Act, was not shown in the DMS, or was shown as a footpath, bridleway or restricted byway.
12. Mr Thompson has occasionally used the Order route in a motor vehicle over the last 25 years, and due to its pavement, street lighting, signage and road traffic signs had assumed it to be a full public highway. However, even if I were to consider that there was sufficient evidence of use with MPVs (and in this case I do not), the available evidence indicates that none of the subsections set out in the 2006 Act apply. Subsections 67(2)(a) and (2)(b) do not apply, the first because, on the evidence, the Order route has been used more by cyclists than by motor vehicles, and the second because it was not recorded on the Council's list of streets at the appropriate date. Subsections 67(2)(c) and (d) of the 2006 Act do not apply because the Order route was created as a private road by agreement in 1883 between various parties and the Hull, Barnsley and West Riding Junction Railway and Dock Company. Finally, subsection 67(2)(e) does not apply as there is no evidence to demonstrate that public use prior to 1930 was by MPVs. Accordingly, I concur with the Council and conclude that rights for MPVs have been extinguished, and the status of Byway is therefore not appropriate.

Restricted Byway or Bridleway status

13. Mr Thompson does, however, support the status of restricted byway. Mr Kind, on the other hand, maintains the only type of user to support such status is pedal cycle user, however the view of the court in *Whitworth* was that pedal cycle user goes to show deemed dedication of a public bridleway.

14. Mr Kind's argument is this. Section 31(1) of the 1980 Act provides that where the public has used a route for 20 years (and sufficiently regularly within each year) a presumption of dedication arises. With regard to use by pedal cycles, the combined effects of section 30(1) and subsection (4) of the Countryside Act 1968 ("the 1968 Act"), the definition of a bridleway for the purposes of section 31 of the 1980 Act as defined in section 329(1), and section 66 of the 2006 Act⁵ are evidence of the deemed dedication of a restricted byway.
15. However, in *Whitworth* Carnwath LJ states at paragraph 42 of the judgement, *"In my view, the same conclusion would follow even if there had been no finding of pre-existing bridleway rights, so that the claim had rested solely on use after 1973. One would then be considering the inference to be drawn from the actual use between 1973 and 1993. It is true that regular use by both horse-riders and cyclists over that period would be consistent with an assumed dedication as a restricted byway at the beginning of the period (had that concept then existed). But it is no less consistent with an assumed dedication as a bridleway, of which cyclists have been able to take advantage under the 1968 Act. Since section 30 involves a statutory interference with private property rights, it is appropriate in my view, other things being equal, to infer the form of dedication by the owner which is least burdensome to him."*
16. Consequently, Mr Kind argues, up to 2 May 2006 evidence of user by the public with bicycles goes to show deemed dedication of a bridleway. After that date, by virtue of the 2006 Act, user evidence by the public with bicycles goes to show deemed dedication of a restricted byway.
17. However, I concur with the Council in that the facts of the present case are materially different to those in *Whitworth*. At paragraph 41 of the judgement, Carnwath LJ refers to an accepted, but unrecorded bridleway, the subsequent use of which by cyclists' post 1968 would have been permitted by the 1968 Act. In those circumstances, such use could not give rise to anything other than a bridleway. Paragraph 41, reads as follows, *"In the present case, the Inspector had found that by 1968, and before the relevant 20-year period, the way had the status of a bridleway. After that time, use of the bridleway by cyclists would have been permitted by the 1968 Act. The owner would have had no power to stop it. There would be no justification therefore for inferring acquiescence by him in anything other than bridleway use. It matters not whether the cyclists were aware of the legal position. What matters is the effect of the use as seen by the landowner. It follows that in considering the extent of deemed dedication, the use by cyclists should be disregarded. Since the only other evidence of use by vehicles is that of Mr Clegg's pony-trap, which admittedly did not extend for the full 20 years, there is no basis for the order to confer anything more than bridleway rights."*
18. In *Whitworth*, there was regular use by 8 horse riders with use by 2 cyclists (by virtue of the 1968 Act). Use solely by horse riders could not support the dedication of a restricted byway, and similarly, use by cyclists alone could not support the dedication of a bridleway. Carnwath LJ, at paragraph 42 of the judgement⁶, took the view that where there was no finding of existing bridleway rights, the combined use by equestrians and cyclists (by virtue of the

⁵ After 2 May 2006 in England

⁶ This was not a determining finding on which the judgement hinged

1968 Act) was consistent with dedication of either a restricted byway or a bridleway, with a bridleway being least burdensome to the landowner.

19. In the present case, and unlike in the facts in *Whitworth*, I have not found the pre-existence of bridleway rights. The situation is as Carnwath LJ sets out in his *obiter dictum* remarks. Further, the balance of user is the opposite of that in *Whitworth*. Here, use by cyclists outweighs use by horse riders (paragraph 5), even taking into account the fact that in addition to the evidence of use by 3 horse riders, a total of 9 individuals refer to having seen users on horseback. Accordingly, I concur with the Council that the facts here are different and there is no basis from which a less burdensome bridleway can be inferred. It seems to me therefore, that the evidence of use by cyclists supports the establishment of a restricted byway over the Order route, as proposed in the Order.

Conclusions

20. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed with a modification (paragraph 10 above) that does not require advertising.

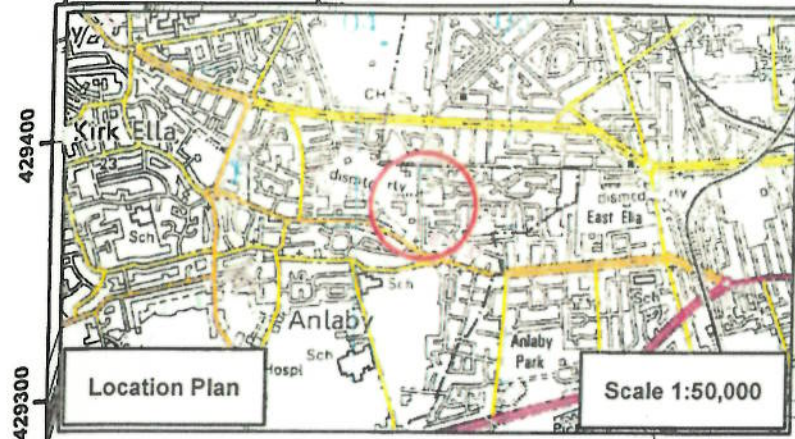
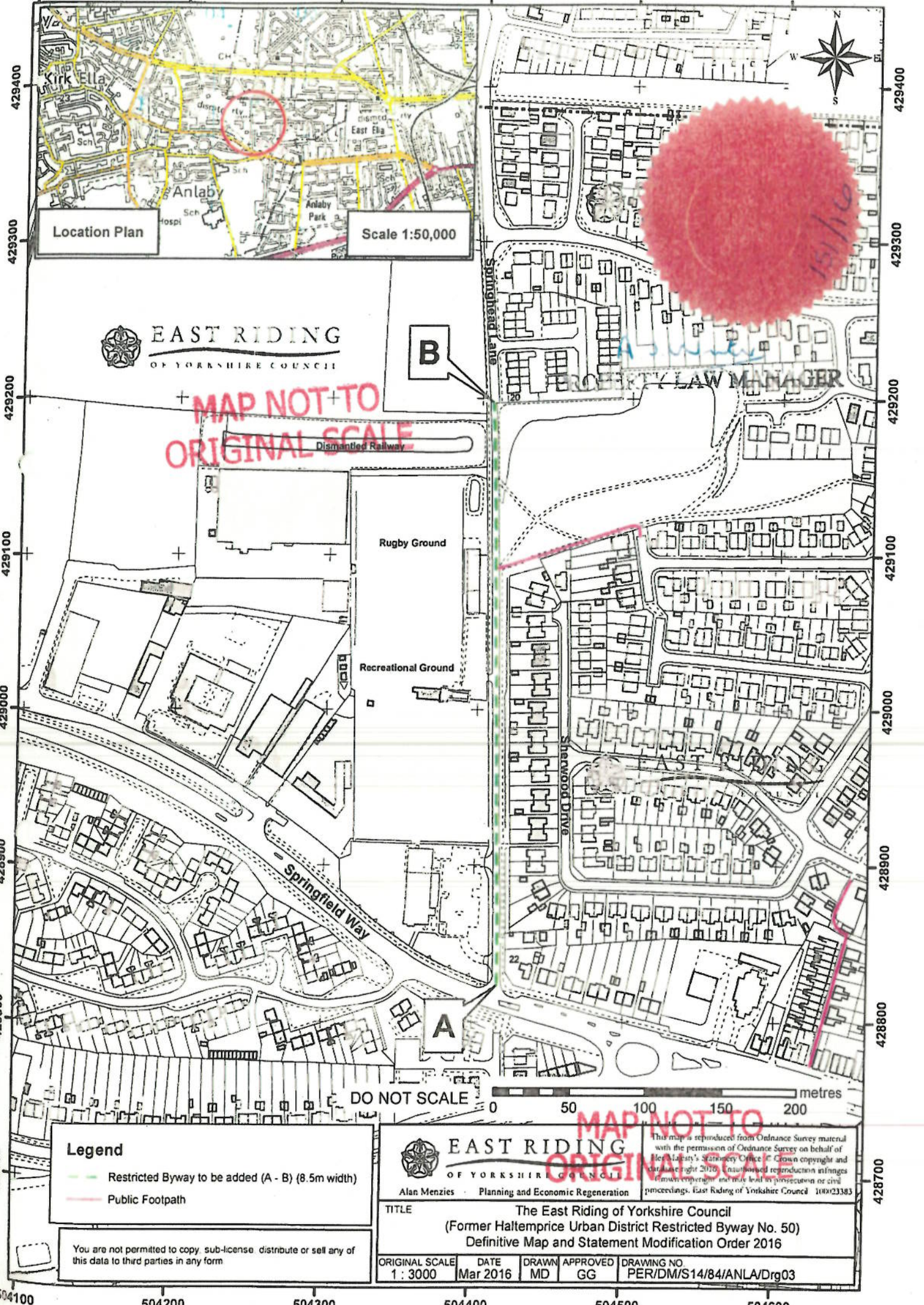
Formal Decision

21. The Order is confirmed subject to the following modification:

- In Part I of the Schedule to the Order, the 'Description of path or way to be added', delete the final sentence in the second paragraph
- In Part II of the Schedule to the Order, delete the text in the box beneath the box headed 'Remarks'

S Doran

Inspector



MAP NOT TO ORIGINAL SCALE

B

PROPERTY LAW MANAGER

Rugby Ground

Recreational Ground

Springfield Way

SHROOD DRIVE

A

DO NOT SCALE

0 50 100 150 200 metres

- Legend**
- Restricted Byway to be added (A - B) (8.5m width)
 - Public Footpath

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EAST RIDING
OF YORKSHIRE COUNCIL

Alan Menzies Planning and Economic Regeneration

MAP NOT TO ORIGINAL SCALE

TITLE				
The East Riding of Yorkshire Council (Former Haltemprice Urban District Restricted Byway No. 50) Definitive Map and Statement Modification Order 2016				
ORIGINAL SCALE	DATE	DRAWN	APPROVED	DRAWING NO.
1 : 3000	Mar 2016	MD	GG	PER/DM/S14/84/ANLA/Drg03